Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
	)	

COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

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SUMMARY

The Commission, acting pursuant to the mandate of Section 103(c) of the STELA Reauthorization Act of 2014 ("STELARA"), has commenced this proceeding to review the "totality of the circumstances" test for evaluating whether broadcasters and MVPDs are negotiating for retransmission consent in good faith. As Chairman Wheeler has indicated, the purpose of this proceeding is to examine the forces that are acting to drive up the price of retransmission consent and adversely impacting the ability of consumers to fairly access local broadcast stations. The legislative history of Section 103(c) confirms that Congress expects the Commission update it's the totality of the circumstances to allow it to engage in a "robust examination" of "all facets" of retransmission consent negotiations – including not only the parties' negotiating tactics, but also the substance of their demands.

When Congress gave broadcasters' retransmission consent rights in 1992, its objectives were to preserve and enhance the availability of free, local over-the-air broadcast television service while ensuring that those viewers who, out of necessity or choice, receive local broadcast stations from an MVPD were not forced to bear the brunt of unreasonable fee demands or face a loss of service. It was Congress' expectation that market forces, supplemented when necessary by Commission intervention, would produce retransmission consent agreements that were consistent with these goals. However, by 1999, concern was growing that changes in the marketplace could give broadcasters the incentive and opportunity to use retransmission consent as a vehicle for advancing their private interests at the expense of the public interest. In response, Congress took the unusual step of imposing on broadcasters the duty to negotiate retransmission consent in good faith (later made reciprocally applicable to MVPDs).

In singling out retransmission consent negotiations for a good faith negotiation obligation, Congress recognized that the public has a special interest in the subject matter and

outcome of those negotiations that it does not have in virtually all other commercial transactions. Only in the context of labor negotiations have lawmakers imposed a similar requirement. Thus, purpose of the good faith requirement is to ensure that retransmission consent negotiations produce outcomes that serve Congress' public policy objectives.

Unfortunately, the Commission's rules implementing the good faith requirement have been a failure. One of the hallmarks of good faith negotiations is that they are to be conducted in an atmosphere of "honesty, purpose and clarity of purpose" with the goal of reaching a mutually acceptable agreement. However, for more than a decade, broadcasters have ignored the "social compact" under which they are granted free use of the public airwaves in exchange for a commitment to serve all of the viewers in their communities – those who access local broadcast stations via an antenna and those who do so by subscribing to an MVPD. Retransmission consent negotiations today produce one-sided agreements that force MVPD subscribers to absorb extraordinary increases in retransmission consent fees that bear no relationship to the broadcasters' investment in local programming or facilities and that are driven by the use of threatened and actual blackouts as well as other coercive tactics.

In order to restore balance to retransmission consent negotiations consistent with Congress' intent, the Commission should be guided by the following principles:

- **The good faith rules in general, and the totality of the circumstances test in particular, are not producing retransmission consent agreements that serve the interests of all consumers.**

- **The Commission must adopt rules that address both the substance of retransmission consent negotiations and the tactics employed during such negotiations, and must provide meaningful remedies for violations.**

- **The Commission has the authority under Section 325 and under Section 103(c) to adopt substantive as well as procedural guidelines and rules for determining whether retransmission consent negotiations are being conducted in good faith and to back up these guidelines with meaningful remedies.**

In accordance with the above principles, Mediacom urges the Commission to consider the following specific revisions to its rules.

Minimizing the risk and impact of blackouts.

Cooling off period. Blackouts of broadcast programming deny viewers access to important local programming, and consequently the opportunities for broadcasters to use blackouts during ongoing negotiations should be minimized. The Commission should borrow from labor law's imposition of "cooling off periods" and mediation to avoid negotiating impasses that would have a significant adverse impact on important national interests. For retransmission consent negotiations, the Commission should declare that it is evidence of bad faith for a bargaining party to refuse to extend an expiring agreement (with a later true-up) unless one of the parties to the negotiation has formally and publicly declared that it no longer wishes to engage in negotiations.

If either of the parties formally declares that negotiations have reached an impasse, the rules should impose a 60-day cooling off period during which an MVPD can attempt to arrange for carriage of a substitute station to mitigate the harm to subscribers from the expiration of the agreement. If the broadcaster is the party that declared the impasse, the rules also would restrict that broadcaster from invoking broadcast exclusivity against a substitute station and would require networks to waive affiliation agreements that prevent stations from granting retransmission consent for out-of-market carriage. If the MVPD is the party that declares an impasse, these obstacle-removing rules would not apply.

Internet blocking. All of an MVPD's customers are innocent victims when broadcasters deny them access to content during a retransmission consent negotiation. But it is especially egregious behavior when a broadcaster blocks consumers from accessing its website or online

content. Freely available content that is generally published online is not the subject of retransmission consent negotiations, and the consumers who are affected by such blocking may not even subscribe to the video service that is the subject of those negotiations. Such Internet blocking should be a *per se* violation of the good faith bargaining requirement.

Broadcaster communications with MVPD customers and uniform election and agreement cycles. During retransmission consent disputes, broadcasters typically run crawls and publish notices designed to disrupt an MVPD's relationship with its subscribers and cause the MVPD to suffer economic harm. These messages never inform customers that the broadcaster could extend the blackout deadline if it wished to do so nor do they suggest over-the-air viewing as an option in the event of a blackout. The Commission should help minimize the confusion this causes customers, and the unreasonable leverage it gives broadcasters, by mandating that the existing rules governing notifications of service changes are the only permissible means of communicating with customers regarding the outcome of retransmission consent negotiations. In addition, consistent with Congress' recognition that having all retransmission consent agreements expire at the end of a three-year cycle would promote reasonable rates by reducing the leverage that a broadcaster gains when its agreements with different MVPDs in the same market expire at different times, the Commission should mandate that the bargaining parties may not require retransmission consent agreements to extend beyond the end of a three-year election cycle.

Promoting the availability of quality free, over-the-air local television.

Mandatory v. non-mandatory subjects of bargaining. Labor law distinguishes between mandatory and non-mandatory subjects of bargaining. Only proposals relating to mandatory subjects of bargaining may be negotiated to the point of impasse. The Commission should draw

a similar distinction in the context of retransmission consent negotiations. The only mandatory subjects of bargaining should be those that advance the public interest goals of retransmission consent. Thus, demanding an increase in retransmission consent fees greater than the budgeted increase in a station's spending for producing and distributing local programming would be a non-mandatory proposal over which negotiations could not break down. Likewise, a broadcaster would not be permitted to condition the grant of retransmission consent for its primary broadcast signal on the MVPD's agreement to carry other broadcast or non-broadcast channels of video programming – only carriage of the primary stream would be a mandatory subject of negotiations.

Substantiating negotiating positions. In the labor law context, it has been held that good faith bargaining "necessarily requires that claims made by either bargainer should be honest claims." Unions and management are required to disclose relevant information to substantiate claims made during negotiations, and the Commission should adopt a similar requirement in the retransmission consent negotiation context. The Commission's original decision not to impose such a duty was based on reasoning that has not been valid since Congress amended the good faith requirement in 2004 to impose a reciprocal obligation on MVPDs to bargain in good faith.

Remedies for violations of the good faith rules.

Meaningful remedies. To ensure compliance with any amendments the Commission makes to its good faith bargaining rules, the Commission should adopt meaningful remedies for violations of those rules. One such remedy should be requiring interim carriage of a broadcast station when a broadcaster has negotiated in bad faith. Other remedies could be enhanced forfeitures or a ban on a broadcaster's right to elect retransmission consent if it is found to have violated its duty to negotiate in good faith.

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COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

Mediacom Communications Corporation ("Mediacom") hereby submits its comments in response to the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[1] In these comments, Mediacom relies on and will not reiterate in detail the extensive factual showings made in the separately filed comments of the American Television Alliance ("ATVA") – an organization to which Mediacom belongs. Rather, Mediacom's intends for its comments to complement the ATVA filing by focusing on the principles that should guide the Commission in implementing Section 103(c) of the STELA Reauthorization Act ("STELARA")[2] and on several specific proposals for updating the "totality of the circumstances" test that are consistent with those principles.

INTRODUCTION AND BACKGROUND

This proceeding concerns the statutory requirement that retransmission consent negotiations be conducted in "good faith." Ordinarily, the parties to pre-contract negotiations are

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[1] *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, MB Docket No. 15-216, 80 Fed. Reg. 59706 (Oct. 2, 2015) ("*NPRM*").

[2] STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059, 2062 (codified at 47 U.S.C. § 325(b)) ("*STELARA*").

under no obligation to bargain in good faith.[3] In fact, the only notable exceptions are negotiations between unions and management for collective bargaining labor agreements and negotiations between broadcasters and MVPDs for retransmission consent.[4] In each of these situations, lawmakers deviated from the rule that applies in virtually every other kind of commercial relationship because of a considered judgment that the public has a special interest in the subject matter and outcome of the negotiations.

There can be no doubt that the subject matter of retransmission consent negotiations – access to local broadcast television stations – is a matter of great public interest. Broadcasters operate pursuant to a "social compact" under which they commit to serve the needs and interests of their local communities return for the free commercial use of public airwaves worth billions of dollars. This social compact does not distinguish between the members of the community who rely on over-the-air reception to receive locally-originated and locally-oriented broadcast programming and the members of the community who receive such programming as part of their MVPD service. Thus, in the words of the broadcast industry, the "test of the broadcasting privilege [must] be based on the needs of the public served," not merely the commercial imperatives of the broadcaster.[5]

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[3] *See, generally, E.* Weitzenböck, *Good Faith and Fair Dealing in the Context of Contract Formation by Electronic Agents*¸ Proceedings of the AISB 2002 Symposium on Intelligent Agents in Virtual Markets 2-5. Once a contract is formed, however, the common law and the Uniform Commercial Code (UCC) impose an obligation of good faith in its performance. Section 1-304 of the UCC states that "Every contract or duty within this Act imposes a duty of good faith in its performance or enforcement." U.C.C. § 1-304. The UCC also incorporates the concept of "good faith" in numerous other provisions. *See, e.g.*, U.C.C. § 2-305(2). Section 205 of the Restatement (Second) of Contracts states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205.

[4] *See* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) ("*NLRA*"). Section 2 of the Railway Labor Act, 45 U.S.C. § 153, also has been interpreted as imposing a duty on the parties to negotiate in good faith.

[5] FEDERAL COMMUNICATIONS COMMISSION, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 280 (2011), *citing* EarlyRadioHistory.us, HTML Reproduction of Photocopy of

That being said, on occasion Congress has found that the public interest and the commercial imperatives of local broadcasters are aligned. This was the case in 1992 when Congress, in response to concerns that the evolution of the cable television industry as both a distributor and creator of video programming posed a threat to "the economic viability of free local broadcast television and its ability to originate quality local programming," gave broadcasters the option of electing to negotiate with MVPDs for the stations' retransmission consent.[6]

The creation of the retransmission consent option reflected Congress' judgment that "there is a substantial governmental interest" in ensuring the continuation of over-the-air television as a source of free local news and public affairs programming.[7] But Congress' objective was not merely to enrich broadcasters for the sake of enriching broadcasters; rather, it was to ensure that free, over-the-air television programming remains "viable well into the future to continue to provide local service to cable subscribers and non-subscribers alike."[8]

Even though the public has a far greater interest in the outcome of retransmission consent negotiations than in the outcome of most other commercial transactions, Congress initially did not require broadcasters and MVPDs to bargain in good faith. Instead, Congress expected that the operation of market forces, supplemented if and when necessary by Commission regulatory intervention, would ensure the outcome of retransmission consent negotiations served the interests of consumers impacted by the results of those negotiations.

Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio, November 9–11, 1925 (Fourth Nat'l Radio Conference Recommendations), http://earlyradiohistory.us/1925conf.htm.

[6] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(16), 106 Stat. 1460, 1462 ("*1992 Cable Act*").

[7] *Id.* at § 2(a)(9)-(11), 1461.

[8] 138 Cong. Rec. H6491 (July 23, 1992) (remarks of Rep. Callahan).

Specifically, Congress anticipated the bilateral monopoly that then existed between broadcasters and cable operators (*i.e.,* the fact that the local broadcaster and the cable operator needed each other in roughly equal measure) would prevent either side from overreaching during retransmission consent negotiations.[9] Just as importantly, Congress expected that the Commission would use its existing authority, as well as authority conferred by the retransmission consent provision itself, to intervene in the event negotiations resulted in runaway price increases or disruptions in service that harmed MVPD subscribers.[10] Indeed, the legislative history indicates that Congress regarded the Commission's ability to ensure that broadcasters did not demand exorbitant retransmission consent fees to be a "critical safeguard" for both cable operators and consumers.[11]

For the most part, the first few rounds of retransmission consent negotiations produced agreements in line with Congress' expectation that market forces would serve the public's interest in ensuring the availability of free, local over-the-air television service without harming MVPD subscribers. But by 1999, there was a growing concern in Congress that changes in the video marketplace (particularly the authorization of local-into-local satellite service) could give broadcasters the incentive and opportunity to use retransmission consent as a vehicle for advancing their private interests at the expense of the public interest. In response to this concern, and in recognition of the public's deep interest in the subject matter and outcome of

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[9] In a bilateral monopoly, "an upstream monopolist sells its output to a single downstream buyer who may also be a monopolist in its output market." Roger D. Blair, David L. Kaserman & Richard E. Romano, A Pedagogical Treatment of Bilateral Monopoly, 55 S. Econ. J. 831 (1989).

[10] *See, e.g.*, 138 Cong. Rec. S562-63 (Jan. 29, 1992) (remarks of Sen. Inouye); 138 Cong. Rec. S643 (Jan. 30, 1992) (remarks of Sen. Inouye); 138 Cong. Rec. S14224 (Sep. 21, 1992) (remarks of Sen. Inouye); 38 Cong. Rec. S14248 (Sep. 21, 1992) (remarks of Sen. Gorton); 138 Cong. Rec. S14615-16 (Sep. 22, 1992) (remarks of Sen. Lautenberg).

[11] See, e.g., 138 Cong. Rec. S14615-16 (Sep. 22, 1992) (Statement of Sen. Lautenberg).

retransmission consent negotiations, Congress took the unusual step of imposing on broadcasters an express duty to negotiate retransmission consent in "good faith."[12]

Unfortunately, measured against Congress' public policy objectives, the good faith negotiation requirement has been an utter failure. One of the hallmarks of good faith negotiations is that they are to be conducted in an atmosphere of "honesty, purpose and clarity of process" with the goal of reaching a mutually acceptable meeting of the minds.[13] However, for more than a decade, negotiations for retransmission consent have been characterized by a lack of transparency and by coercive practices that result in one-sided agreements in which the private interests of broadcasters and their corporate parents are put ahead of the public interest. The retransmission consent process has become so one-sided that many agreements more closely resemble contracts of adhesion than the product of a good faith, competitive market-based negotiation as Congress expected.

In STELARA, Congress recognized that the breakdown in the retransmission consent process is contrary to the public interest and that the Commission needs to be more assertive in its oversight of retransmission consent negotiations on behalf of consumers. To achieve this end, Congress made certain specific changes in the good faith rules. These included directing the Commission to "prohibit a television broadcast station from limiting the ability of a [MVPD] to carry into the local market … of such station …any television broadcast signal such distributor is authorized to carry under section 338, 339, 340, or 614 of [the] Act, unless such stations are

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[12] Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 - Appendix I, § 1009, 113 Stat. 1501A, 538 ("*SHVIA*") (codified as amended at 47 U.S.C. § 325(b)).

[13] *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 24 (2000) ("*Good Faith Order*").

directly or indirectly under common de jure control permitted by the Commission."[14] While the Commission merely added this provision to its list of *per se* good faith violations without further comment,[15] the legislative history makes clear that Congress "intend[ed] this provision to be interpreted broadly by the FCC to ensure that a local television broadcast station is not able to limit MVPD carriage of other stations that it is permitted to carry pursuant to the Communications Act."[16]

Even more importantly, Congress directed the Commission to commence this rulemaking proceeding.[17] As the relevant legislative history states, the purpose of this proceeding is "to review and update [the good faith rules'] totality of the circumstances test."[18] The legislative history further indicates that Congress expects the Commission to use its authority to implement and enforce the requirement that retransmission consent negotiations are being conducted in good faith to engage in a "robust examination" of "all facets" of those negotiations – including not only the parties' bargaining tactics, but also the substance of their demands.[19]

Consistent with the mandate of Section 103(c), the *NPRM* solicits comment on a wide array of retransmission consent reform proposals that the Commission has received over the years, including several put forward by Mediacom in its numerous filings in MB Docket No. 10-

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[14] *STELARA* at § 103(b). *See also*, *id.* at § 103(a) (prohibiting joint retransmission consent negotiations by non-commonly owned broadcasters in the same market).

[15] *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd 2380, ¶ 5 (2015) ("*STELARA Sections 101,103, and 105 Order*").

[16] Report from the Senate Committee on Commerce, Science, and Transportation accompanying S.2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) (*"Senate Commerce Committee Report"*); *see also NPRM* at ¶ 17, n. 94.

[17] *STELARA* at § 103(c).

[18] *Senate Commerce Committee Report* at 13.

[19] *Id.*

71.[20] In the past, the Commission has shied away from these proposals based on its belief that Section 325(b) narrowly circumscribes its authority to consider the substance of retransmission consent negotiations or to intervene to prevent a service disruption when negotiations break down. But over five years ago, Mediacom thoroughly briefed the issue of the Commission's authority in comments filed in MB Docket No. 10-71. Those comments demonstrate that the Commission's narrow interpretation of its authority is at odds with the wording of Section 325(b), the provision's legislative history, and administrative rulings and judicial decisions regarding the scope of the Commission's ancillary authority.[21]

Neither the Commission nor the broadcasters have ever attempted to rebut Mediacom's arguments and Mediacom will not repeat them in detail here. Mediacom also will not attempt to address all of the reform proposals identified in the *NPRM*.[22] Rather, in the discussion that follows, Mediacom will focus specifically on the Commission's obligation – and authority – under Section 103(c) to amend its rules to ensure that retransmission consent negotiations are producing agreements that serve the public interest.

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[20] *See e.g.*, Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC D/B/A Suddenlink Communications, MB Docket No. 10-71 (filed June 3, 2010) ("*Joint Reply Comments*"); Letter from Seth A. Davidson, Counsel to Mediacom, to FCC Chairman Julius Genachowski, et al., MB Docket No. 10-71 (Aug. 12, 2010); Letter from Seth A. Davidson, Counsel to Mediacom, to Marlene Dortch, FCC Secretary, MB Docket No. 10-71 (Feb. 11, 2011); Joint Comments of Mediacom Communications Corporation and Cequel Communications LLC D/B/A Suddenlink Communications, MB Docket No. 10-71 (filed May 27, 2011); Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC D/B/A Suddenlink Communications, MB Docket No. 10-71 (filed June 27, 2011); Reply Comments of Mediacom Communications Corporation, MB Docket No. 10-71 (filed June 27, 2011) ("*2011 Reply Comments*); Letter from Seth A. Davidson, Counsel to Mediacom, to Jonathan Sallet, FCC General Counsel, MB Docket No. 10-71 (Mar. 6, 2014); Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC D/B/A Suddenlink Communications, and Bright House Networks, LLC, MB Docket No. 10-71 (filed June 26, 2014); Letter from Rocco B. Commisso, Chairman and Chief Executive Officer of Mediacom, to FCC Chairman Thomas E. Wheeler, MB Docket No. 10-71 (July 7, 2015).

[21] *See, e.g.*, *Joint Reply Comments* at 32-46; *2011 Reply Comments*.

[22] Mediacom addressed many of the proposals in the *NPRM* in its numerous filings in MB Docket No. 10-71. Mediacom incorporates by reference its filings listed *supra* n. 20, as well as all of its other filings in MB Docket No. 10-71.

DISCUSSION

I. The Commission's Goal in this Proceeding Must Be to Adopt Meaningful Rules that Promote the Successful Conclusion of Retransmission Consent Agreements Consistent with Congress' Expectation that the Substantive Terms of Such Agreements will Benefit Viewers of Free-Over-the Air Television Without Adversely Impacting MVPD Customers.

Congress amended Section 325 of the Communications Act to extend to broadcasters the right to negotiate with MVPDs for the station's "retransmission consent" with the expectation that the exercise of this right by broadcasters would serve the public interest of all television viewers by preserving and expanding the "universal availability" of quality free over-the-air television service without adversely affecting those members of the public who, by choice or necessity, receive broadcast programming from an MVPD.[23] In other words, Congress did not intend for the broadcasters' exploitation of their retransmission consent rights to be an end unto itself; rather, retransmission consent was intended by Congress to secure the public's continued access to quality, free local over-the-air broadcast television service in a manner that did not pick the pocket of MVPD customers or subject them to service disruptions.

In this proceeding, Congress has directed the Commission to update the "totality of the circumstances" standard for assessing whether retransmission consent negotiations are being conducted in good faith and in service of that public policy objective. As Chairman Wheeler has stated, the Commission's mandate includes "examin[ing] the forces that act to drive up cable rates and the ability of consumers to fairly access video programming."[24] In carrying out this mandate, the Commission should be guided by the following principles:

- The Commission's primary responsibility is to ensure that its rules implementing the good faith requirement create conditions that make it more likely than not that

[23] *See* 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye). ,

[24] *See* Letter from FCC Chairman Thomas E. Wheeler to The Honorable Hakeem Jeffries (Nov. 10, 2015).

the parties can reach agreements that advance the consumer interests that retransmission consent is supposed to serve.

- The rules that the Commission adopts in this proceeding need to address both the substance of retransmission consent negotiations and the tactics employed during such negotiations, and must provide meaningful remedies for violations.

- The Commission has the authority to adopt substantive as well as procedural guidelines and rules for determining whether retransmission consent negotiations are being conducted in good faith and to back up these guidelines with meaningful remedies.

A. As implemented by the Commission, the good faith requirement, and the totality of the circumstances test in particular, are not producing retransmission consent agreements that serve the interests of consumers.

The negotiations between broadcasters and MVPDs for the grant of a station's retransmission consent are not producing agreements that serve the public interest. And the Commission's toothless implementation of the good faith negotiation requirement (and of the totality of the circumstances test in particular) is largely to blame. When the Commission first implemented the good faith requirement in 2000, it acknowledged that the duty to negotiate in good faith was not "largely hortatory" and that broadcasters were subject to "some heightened duty of negotiation" with obligations "greater than those under common law."[25] Nevertheless, citing the generally peaceful history of retransmission consent negotiations up until that time and relying on some (but not all) elements of the good faith standard as applied in the labor law context, the Commission adopted several *per se* rules focusing largely on the procedural aspects of the negotiating process – rules that, as interpreted by the Commission, are easily met even when a bargaining party is otherwise acting unreasonably.[26]

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[25] *Good Faith Order* at ¶ 24.

[26] *Id.* at ¶¶ 39-46.

In addition to the largely procedural *per se* good faith standards, the Commission incorporated into its rules the labor law concept of a "totality of the circumstances" test. According to the Commission, the totality of the circumstances test is supposed to be "broader" than the *per se* procedural standards and provide a way for a bargaining party to challenge particularly "outrageous" demands made by the other bargaining party.[27] Yet, the Commission undercut the effectiveness of this "broader" standard by indicating from the outset that the totality of the circumstances test was not meant to "serve as a 'back door' inquiry into the substantive terms negotiated between the parties."[28] The efficacy of the good faith requirement was further undermined by the Commission's refusal to consider meaningful remedies for violations of the rules, such as interim carriage requirements or mandatory mediation.[29]

Not surprisingly, in the absence of an effective set of good faith standards that take into consideration whether the increased fees that broadcasters demand year after year are being used as Congress intended and that allow blackouts as a bullying tactic, the broadcasters have been able to run wild. The stations' retransmission consent demands have become untethered from the goal of preserving and expanding free local television service: instead of funding the creation and distribution of local content, local broadcasters use retransmission consent revenues to pay "reverse compensation" to the national broadcast networks, to finance the acquisition of additional stations and non-broadcast ventures, or to fund stock repurchases and exorbitant executive salaries. In addition, taking advantage of the deficiencies in the rules, the broadcasters

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[27] *Id.* at ¶ 32.

[28] *Id.*

[29] *Id.* at ¶¶ 80-82.

show absolutely no regard for the harms their demands and negotiating tactics cause MVPD customers.

Mediacom expects that the broadcasters will deny all of the above. Even as increases in the fees demanded for retransmission consent far outpace the rate of inflation, even as these increased fees are used for purposes unrelated to the production and acquisition of locally-oriented and originated programming or the expansion of the geographic reach of the local broadcaster's over-the-air service, and even as the number of consumers adversely impacted by blackouts and threatened blackouts grows, the broadcasters almost certainly will defend the *status quo*. They will argue, as they have in the past, that the increase in retransmission consent prices is merely part of a temporary "market adjustment," that broadcasters and MVPDs have relatively equal leverage in negotiations, and that blackouts are rare and more often than not the fault of a few MVPDs who push negotiations to the breaking point to advance their case for reform.[30] In other words, the broadcasters will argue that there is no need for the Commission to "fix" its good faith rules because those rules aren't broken.

But the Commission's rules <u>are</u> broken. For years, broadcasters have relied on the fact that even if lightning were to strike and the Commission actually decided to do something effective to protect consumers from a blackout, the MVPD, suffering growing subscriber losses, would be forced to cave long before the Commission acted. Broadcasters are well aware of the fact that once the MVPD caves, the FCC's practice has been to simply drop the matter because its aversion to intervention has outweighed the harm to consumers in the form of exorbitant retransmission consent fee increases.

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[30] *See, e.g., Ex parte* notice of National Association of Broadcasters, MB Docket No. 10-71 (filed Aug. 24, 2015); *Ex parte* notice of National Association of Broadcasters, MB Docket No. 10-71 (filed July 23, 2015).

In other words, the fact that most retransmission consent disputes end without the Commission having to pass judgment on whether one party or another has violated its duty to negotiate in good faith does not prove that the current rules are working. Quite the opposite. The fact that disputes are settled shortly after a blackout is imposed merely confirms the raw coercive power of that tactic and reflects the Commission's past history of speaking loudly but carrying a popsicle stick when it comes to protecting consumers. As a representative of a major station owner threatening a blackout once told Mediacom, "Those guys [at the FCC] are not going to do anything."

Additional proof that the Commission's good faith rules are ineffective at preventing broadcasters from enriching themselves at the expense of Congress' pro-consumer public policy objectives comes from the mouths of the broadcasters themselves. For example, Sinclair's President and CEO, David Smith, has candidly admitted that because of increasing pressure placed on local stations to subsidize the operations of the national networks, he expects retransmission consent fees to keep going up "forever."[31] Moreover, CBS President and CEO Les Moonves has boasted that when it comes to the price of retransmission consent, "the sky is the limit"[32] and has touted the power to blackout an MVPD's access to a station as the "ultimate leverage" in retransmission consent negotiations,[33] thereby undermining NAB's laughable assertions that blackouts are occurring because MVPDs somehow are intentionally causing broadcasters to refuse to extend expiring agreements while the parties continue to negotiate.[34]

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[31] Communications Daily, May 5, 2011 at page 5.

[32] CableFAX Daily, June 3, 2011 at 2.

[33] *Id.*

[34] *See, e.g., Ex parte* notice of National Association of Broadcasters, MB Docket No. 10-71 (filed July 23, 2015).

Of course, the best answer to the broadcasters' claims that there is nothing wrong with the Commission's implementation of the good faith rules comes from Congress itself. If there was nothing wrong with retransmission consent, Congress would not have enacted Section 103(c) of STELARA. That provision and its legislative history reflect Congress' determination that consumers are losing faith in the retransmission consent process as a result of the coercive negotiating tactics employed by the broadcasters during what are supposed to be good faith negotiations.[35] Congress expects the Commission to take whatever steps are needed to restore public faith in retransmission consent. These steps include adopting rules that will increase the likelihood that local stations will use the fees they collect to improve and extend the availability of local broadcast service. Just as importantly, the rules must reduce the likelihood MVPD customers will be subjected to blackout threats, actual blackouts, and other coercive negotiating tactics (such as blocking Internet access or disseminating misleading notices suggesting to an MVPD's customers that a blackout is imminent and/or that changing MVPD service providers is the only way to avoid an interruption in access to the station's programming).

B. The Commission must adopt rules that address both the substance of retransmission consent negotiations and the tactics employed during such negotiations and provide meaningful remedies for violations.

The Commission has recognized that the good faith standard is more than hortatory and that it imposes obligations on the bargaining parties that are greater than those applicable to ordinary business transactions.[36] However, until now, the Commission has declined to impose meaningful limits on either the substance of retransmission consent demands or the use of blackouts or other coercive tactics to bully MVPDs into accepting unreasonable retransmission

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[35] *See Senate Commerce Committee Report* at 13.

[36] *Good Faith Order* at ¶ 24.

consent terms. That approach must end. Congress has directed the Commission to update the totality of the circumstances test precisely because the current version does not deter the broadcasters from making substantive demands that are injurious to MVPD subscribers or from engaging in tactics that disrupt MVPD subscribers' access to local stations as a way of forcing the MVPD to accept the broadcaster's demands.

In particular, the Commission must make clear that a bargaining party's tactics can be found to violate the good faith negotiation requirement even if they do not violate legal strictures on anticompetitive behavior or fraud. Presuming that particular conduct is consistent with the good faith requirement so long as that conduct does not violate the antitrust laws or amount to actionable fraud creates a standard that has no foundation in the legislative history of either the retransmission consent provision or the good faith requirement. Congress did not grant the Commission the authority under Section 325(b) to ensure that retransmission consent negotiations are conducted in good faith merely to prevent behavior that already was unlawful. Rather, the good faith standard was intended to provide the Commission with the means to protect consumers from retransmission consent demands and tactics even if those demands and tactics would not violate generally applicable laws designed to prevent or punish anticompetitive or fraudulent behavior.[37]

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[37] This is conceptually consistent with the approach taken under the National Labor Relations Act (NLRA) and other labor relations statutes. In rules and decisions adopted under that law, the driving question is whether the demands and tactics protect consumers by promoting interstate commerce. The National Labor Relations Board does not sit-in on negotiations between employers and employee unions proposing or rejecting specific terms, but it does define the bounds of good faith bargaining in such a way as to eliminate tactics and demands that do more harm than good for the flow of goods and services upon which consumers and the economy rely. *See, e.g.*, Labor Management Relations Act, 1947, Pub.L. 80–101, § 1(b), 61 Stat. 136, 136 ("It is the purpose and policy of this Act, in order to promote the full flow of commerce… to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce").

This does not mean, of course, that the Commission has *carte blanche* in deciding what is or is not consistent with the duty to bargain for a retransmission consent agreement in good faith. The requirement that the retransmission consent negotiations be conducted in good faith does not prevent "hard" bargaining or compel the parties to reach an agreement.[38] But the mere fact that the parties reach an agreement averting or ending a blackout threat does not, in and of itself, mean both parties have negotiated in good faith. An inherent feature of a good faith negotiation is that it produces an agreement that both sides enter into willingly, based on the persuasive reasoning of the bargaining table rather than on the use of threats or coercive tactics.[39]

Thus, in order to fulfill Congress' mandate under Section103(c), the Commission must adopt rules that allow it to assess whether a particular substantive retransmission consent demand or negotiating tactic is consistent with the public interest and whether such demands or tactics will make it more or less likely that the parties will reach an agreement based on a freely arrived at meeting of the minds rather than as a result of one party's capitulation to coercion or threats. Put another way, the Commission should regard the parties to a retransmission consent negotiation as having a fiduciary responsibility to the public and measure the totality of their behavior against a simple standard: are the negotiations producing more good than harm for the consumers impacted by the negotiations.

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[38] *See NLRA* § 8(d), 29 U.S.C. § 158(d); s*ee also Good Faith Order* at ¶ 40, n. 94, *citing Candide Productions Inc. v. Int'l Sk*at*ing Union*, 530 F. Supp. 1330, 1337 (S.D.N.Y. 1982).

[39] *See, e.g., Good Faith Order* at ¶ 24; At*las Mills, Inc.*, 3 NLRB 10 (1937); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

C. The Commission has the necessary authority to adopt substantive and procedural good faith standards and remedies for violations of those standards that will promote the successful resolution of retransmission consent negotiations on terms that are consistent with the public interest.

Just as the broadcasters can be expected to argue that there is no need for the Commission to update the totality of the circumstances standard (see above), so too can the broadcasters be expected to contend that the Commission lacks the statutory authority to adopt rules that address the substance of retransmission consent demands or that would require a broadcaster and MVPD to extend, even on a temporary basis, an expiring retransmission consent agreement. The broadcasters undoubtedly will point to prior rulemaking decisions and adjudicatory orders in which the Commission adopted a narrow interpretation of its authority to review the substance of retransmission consent proposals or intervene when the parties to a retransmission consent negotiation reach an impasse.

Mediacom's unrebutted analysis of Section 325, its history, and the relevant case law conclusively demonstrates that the Commission's past failure to ensure that a broadcaster's exercise of its retransmission consent right provides consumers with the benefits intended by Congress reflects a lack of will on the part of the Commission, not a lack of authority.[40]

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[40] *See Joint Reply Comments* at 32-46. For example, neither the broadcaster nor the Commission has ever attempted to explain how a narrow interpretation of Section 325 can be squared with the Commission's interpretation of Section 621. Section 325, which prohibits an MVPD from retransmitting a broadcast station's signal "except with the express consent" of the station, but otherwise broadly allows the Commission to regulate the "exercise by television broadcast stations of the right to grant retransmission consent," allegedly prevents the Commission from adopting rules or taking remedial actions that would, by operation of law, temporarily extend a broadcaster previous grant of consent while the parties continue to negotiate. Yet, the Commission held (and the Sixth Circuit affirmed) that Section 621, which bars a cable operator from providing cable service without a franchise issued by a franchising authority, and does not expressly give the Commission any power to regulate the cable operator-franchisor relationship, allowed the Commission to grant a temporary franchise to competing cable operators who have been unsuccessful in obtaining a franchise from the franchising authority. If the Commission has the authority to step into the shoes of a franchising authority (over whom the Commission's authority is limited), it certainly has the authority to step into the shoes of a broadcaster (over whom the Commission's authority is essentially plenary). *See id*. at 45-46.

Fortunately, as the Supreme Court declared in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* "An initial agency interpretation is not instantly carved in stone."[41]

This principle was most recently on display in the *Open Internet Order*, where the Commission revisited and reversed its prior decision classifying broadband Internet access service as an information service.[42] In support of its decision, the Commission pointed to the fact that its original statutory interpretation "was based largely on a factual record compiled over a decade ago" when broadband service was in an "early evolutionary period."[43] The Commission concluded that a new interpretation was warranted because the "premises underlying [its original decision] have changed."[44]

The Commission could have been talking about its interpretation of the scope of its authority under Section 325 when it offered its rationale for revisiting its broadband classification decision. Like its interpretation of the proper classification for broadband service, the Commission's interpretation of Section 325 was based on a factual record that was compiled more than a decade ago, during retransmission consent's "evolutionary period." In addition, the

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[41] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 981-82 (2005). *See also, Joint Reply Comments* at 43 *citing NCTA v. Brand X Internet Servs*., 545 U.S. 967, 981-82 (2005); *Review of the Commission's Program Access Rules*, First Report and Order, 25 FCC Rcd 746, ¶ 11, n.23 (2010).

[42] *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, ¶¶ 43, 329 (2015).

[43] *Id*. at ¶ 330.

[44] *Id.* The Commission's brief defending its reclassification of broadband Internet access service points out that even if the facts regarding how such service is offered had not changed, it was well within the agency's authority to disavow its prior interpretation, stating that its "obligation to 'consider varying interpretation and the wisdom of its policy on a continuing basis'" was "well settled." Brief for Respondents at 68-69, United States Telecom Ass'n v. FCC, No. 15-1063 (D.C. Cir. Sep. 14, 2015) *citing* Brand X and Chevron. Indeed, the Commission "has the right to view the same facts differently in light of changed circumstances or more pressing policy goals." *Id., citing Nat'l Ass'n of Home Builders v EPA*, 682 F. 3d 1032, 1038 (D.C. Cir. 2012) (emphasis supplied). *See also Ass'n of Public Safety Officials-International, Inc. v. FCC*, 76 F. 3d 395,398 (D.C. Cir. 1996) (holding that the same record that formed the basis for a prior FCC policy could also support the Commission's subsequent "about-face" on the issue).

premises underlying the Commission's decisions regarding its authority to consider the substantive terms of retransmission consent negotiations and to prevent or mitigate service disruptions have changed dramatically over the past decade.

For example, in its initial *Good Faith Order*, adopted fifteen years ago, the Commission expressed concern about service disruptions, but declined to take any action that would reduce the likelihood such disruptions would occur.[45] The reason, according to the Commission, was that blackouts were expected to be rare given that the "market has functioned adequately since the advent of retransmission consent in the early 1990's."[46] Similarly, in 2004, in its order implementing legislation that extended "reciprocal" good faith negotiation obligations to MVPDs, the Commission opted not to treat agreements between networks and affiliates that prevented a station from granting retransmission consent outside its market as violations of the good faith standard, relying on its belief that if asked, networks would likely find it advantageous to waive these provisions.[47]

As the Commission (and the public at large) now knows, retransmission consent is not functioning "adequately." Hyper-inflationary price increases have become the norm and blackouts and threatened blackouts have become everyday weapons in the broadcasters' arsenal of negotiating tactics. In addition, contractual provisions that prevent a network affiliate from exercising its right to grant retransmission consent for the out-of-market carriage of its signal are becoming the rule, not an exception, as broadcasters employ every possible tactic to maximize

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[45] *Good Faith Order* at ¶ 61.

[46] *Id*.

[47] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 10339, ¶¶ 34-35 (2005) ("*Reciprocal Bargaining Order*").

the harm inflicted on consumers by blackouts.[48] To the best of Mediacom's knowledge, there is no instance in which a network has waived such a provision or has granted consent to the out-of-market carriage of one of its owned and operated stations where such carriage would mitigate the effect of a blackout.

Of course, the most significant "changed circumstance" that has occurred since the Commission narrowly interpreted the scope of its authority to protect consumers under Section 325(b) is the enactment of Section 103(c) of STELARA. Section 103(c) represents an acknowledgment by Congress that retransmission consent negotiations have changed in recent years. In light of these changes, and their adverse impact on consumers, the Commission has the opportunity and the obligation not just to review it rules, but to update them in ways that will increase the likelihood that retransmission consent negotiations will produce agreements that benefit off-air viewers without harming MVPD customers. Furthermore, as discussed above, Congress has made it clear that the Commission has the authority to engage in a "robust examination" of "all facets" of retransmission consent negotiations, including the parties' substantive bargaining demands as well as their negotiating tactics.[49]

Thanks to this nudge from Congress, it appears that the Commission finally is ready to reconsider the error of its laissez-faire approach to retransmission consent negotiations. It was most heartening to see Chairman Wheeler acknowledge earlier this year that "[t]he public interest is the Commission's responsibility" and state that the Commission would not "stand idly by" while consumers "are being denied access to local [broadcast television] programming" in a

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[48] *See Sports Blackout Rules*, Report and Order, 29 FCC Rcd 12053, ¶33 (2014) ("it appears that [provisions limiting a station's right to grant out-of-market retransmission consent] are likely standard clauses routinely included in network affiliation agreements").

[49] *Senate Commerce Committee Report* at 13.

retransmission consent dispute.[50] Because blackouts are only one part of the problem with the current retransmission consent regime, the Commission needs to do more than adopt rules that respond to service disruptions after they occur. Rather, the Commission's goal should be reduce the likelihood of such disruptions occurring in the first place. In the section of these comments that follows, Mediacom proposes several changes in the good faith rules that will help the Commission achieve that goal.

II. The Commission Can and Should Adopt the Following Proposals as Rules or Presumptive Guidelines to Ensure that Retransmission Consent Negotiations Reflect a Good Faith Effort to Reach an Agreement that Is Consistent With the Interests of the Consumers Impacted by the Negotiations.

In Section 103(c) of STELARA, Congress directed the Commission to commence this proceeding for the purpose of reviewing and updating the totality of the circumstances test for determining whether retransmission consent negotiations are being conducted in good faith. There is, of course, no one silver bullet to "fix" retransmission consent and the rules adopted by the Commission in this proceeding should not pick winners or losers or directly involve the Commission in dictating the prices and terms of retransmission consent. However, the Commission can and should adopt rules and guidelines such as those described herein. These proposals share a common theme: they seek to increase the likelihood that retransmission consent negotiations will produce a mutually satisfactory agreement, untainted by coercive bargaining tactics, whose terms are consistent with Congress' expectation that the public will be third-party beneficiaries of every retransmission consent agreement.

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[50] Statement of FCC Chairman Thomas E. Wheeler on Retransmission Dispute Between Dish Networks and Sinclair Broadcasting (Aug. 26, 2015), *available* at https://apps.fcc.gov/edocs_public/attachmatch/DOC-335057A1.pdf.

A. Actions that Will Reduce the Blackout Risk

The highly coercive effect of a blackout makes its use as a tactic in retransmission consent negotiations inherently inconsistent with notions of good faith bargaining.[51] Even more importantly, as the legislative history of Section 103(c) recognizes, when blackouts occur, consumers suffer.[52] And while the parties to a negotiation that ends in a blackout invariably accuse each other of having caused the breakdown, consumers don't care about affixing blame. What consumers want are solutions that will put their needs and interests ahead of those of the warring parties.

Admittedly, there are limits as to how far the Commission can go in bringing the parties together. At some point, the parties to any negotiation, even a retransmission consent negotiation, have to be able to walk away from the table. Nonetheless, because there is a strong public interest in avoiding breakdowns in retransmission consent negotiations, the Commission can and should modify its rules to better define the circumstances in which a blackout (or a threatened blackout) can occur. The Commission also can and should make the use of blackouts as a negotiating strategy less attractive by adopting measures that will mitigate the harm that blackouts and threatened blackouts cause consumers.

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[51] For example, while the NLRA permits a union to attempt to persuade a neutral third party to cease doing business with the employer on the other side of the negotiations through the use of appeals to conscience, coercion of neutral parties to put pressure the other party to the negotiation is explicitly prohibited. To be an illegal form of coercion, it must be (1) designed to interrupt the business relationship between the neutral party and the employer; and (2) must involve something more than just persuasion, such as a threat directed at the neutral party, or a boycott or picketing of the neutral party. *See* 29 U.S.C. § 158(b)(4); *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797 (2010).

[52] *Senate Commerce Committee Report* at 13.

1. The Commission's Rules Should Allow Blackouts Only Where Negotiations Have Reached a Final Impasse and only after a Cooling Off Period and Mediation.

As suggested above, one of the principal reasons Congress mandated this proceeding is the harm that consumers suffer when broadcasters resort to blackouts and blackout threats as a bargaining tactic in retransmission consent negotiations. Consequently, one of the Commission's principal objectives in this proceeding must be to design a set of rules and procedures that will minimize the opportunity for broadcasters to use blackouts and blackout threats to force MVPDs to agree to terms that are not in the best interests of their customers and that they would not otherwise accept.

In the labor law context, lawmakers have employed a number of tools for reducing the risk of a strike or lockout, including mandatory cooling off periods and mediation. The more significant the impact a shutdown would have on important national interests (as is the case when the labor disputes threatens railways or airlines), the greater the level of intervention to prevent the shutdown.[53] While Mediacom recognizes that the exact approaches developed in the context of labor law may not be directly applicable or appropriate in the retransmission consent context, the concepts are worthy of consideration.

Thus, in its September 28, 2015 letter to Chairman Wheeler, Mediacom suggested that the Commission should modify its rules so that it is evidence of bad faith for a negotiating party to refuse to agree to an extension of an expiring agreement in the absence of a legitimate reason, apart from bullying the other side, for causing disruption to consumers.[54] Unless one of the parties to the negotiation has formally (and publicly) declared that it no longer wishes to engage

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[53] *See, e.g.*, 29 U.S.C. §§ 158(d), (g); 45 U.S.C. §§ 156-165; 45 U.S.C. §§ 181-188.

[54] Letter from Seth A. Davidson, Counsel to Mediacom Communications Corporation to Thomas E. Wheeler, Chairman, Federal Communications Commission, MB Docket No. 15-216 (Sep. 28, 2015).

in negotiations with the other side, it would be evidence of bad faith for either party to refuse to agree to an extension of the expiring agreement based on the highest price the MVPD had offered during the negotiations (subject to a "true-up" in the event the parties eventually reach an agreement).

If and when one of the parties formally declares that the negotiations have reached an impasse – that no further concessions can be expected from that party – the extension agreement (or the original agreement if the impasse is declared on or before the expiration of the existing agreement) would be allowed to expire, but only after a 60-day "cooling off" period. The principal purpose of this 60-day cooling off period would be to allow the MVPD to attempt to arrange for the carriage of a substitute station in order to mitigate the disruption to its subscribers. Carriage of the substitute station could only begin when the cooling off period ends and would have to terminate if the parties subsequently restarted negotiations and reached a carriage agreement. In addition, the MVPD would have to obtain retransmission consent from the substitute station and would have to pay compulsory license royalties for carrying the substitute station. Furthermore, if the MVPD is the party that declared that the negotiations had reached an impasse, its efforts to arrange substitute carriage would be subject to contractual agreements that limit stations from granting consent to out-of-market carriage and to the enforcement by the local station of its non-duplication rights.

On the other hand, if the party that declared the existence of an impasse is the broadcaster, the MVPD's carriage of the substitute station after the end of the cooling off period would not be subject to certain other rules that today create nearly insurmountable obstacles to an MVPD's ability to mitigate the impact of a blackout by offering its customers a close

substitute for the blacked out station.[55] As Chairman Wheeler recently acknowledged, the network non-duplication and syndicated exclusivity rules "aggravate the harm to consumers during retransmission consent disputes" and thus consideration of changes to these rules is "an integral part of any review of the retransmission consent regime."[56] The revised rules should provide that it is a presumptive violation of the good faith negotiation requirement for a local station to invoke the network non-duplication or syndicated exclusivity rules against a cable operator's carriage of a substitute station where the local station is the party that gave notice that the negotiations had reached an impasse.[57]

The revised rules for reducing the risk of blackouts also should reverse the Commission's unduly narrow interpretation of the existing prohibition against the "execution by a Negotiating Party of an agreement with any party, a term or condition of which requires that such Negotiating Party not enter into a retransmission consent agreement with any other …[MVPD]."[58] On its face, this language would seem to apply where a broadcast station enters into an affiliation agreement with a network (*i.e.*, "any party") that prevents the station from

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[55] Section 76.65(b)(1)(ix) of the Commission's good faith rules, which was added pursuant to Section 103(b) of STELARA, bars local broadcast stations from limiting the ability of an MVPD to carry into the station's local market any other station that the MVPD is permitted to carry under various statutory provisions (including Section 614). Although the Senate Report indicates that the Commission should interpret this provision broadly, the order adding it to the list of good faith violations did not offer any guidance as to how it impacts retransmission consent disputes. *STELARA Sections 101,103, and 105 Order*. The Commission should clarify that because Section 614 of the Communications Act permits cable operators to carry distant broadcast signals at their discretion (subject to obtaining retransmission consent from the distant station where necessary), a local station may not condition its grant of retransmission consent to an cable operator on the operator's agreement not to import a distant signal, either during the term of the agreement or thereafter. A similar clarification also should be adopted with respect to the carriage of broadcast signals by satellite carriers.

[56] *See* Letter from FCC Chairman Thomas E. Wheeler to The Honorable Hakeem Jeffries (Nov. 10, 2015).

[57] While satellite carriers are not subject to the same non-duplication rules as cable operators, they are subject to other limitations on their ability to important out-of-market stations. Those limitations also would apply, or not apply, depending on which party declared the negotiations to have reached an impasse.

[58] 47 C.F.R. 76.65(b)(vi).

granting retransmission consent to an out-of-market MVPD. However, the Commission has insisted that this provision applies only to "collusion between a broadcaster and an MVPD that contemplates non-carriage of the broadcaster's signal by another MVPD, and was not intended to 'affect the ability of a network affiliate agreement to limit redistribution of network programming.'"[59]

The Commission's exclusion of network affiliation agreements from the prohibition against agreements with "any party" that prevent a station from entering into a retransmission consent agreement with any other MVPD is at odds with the plain language of the rule. It also is at odds with the clear intent of Congress to limit the role that the national networks can play in the retransmission consent process.[60] Because the rule prohibiting agreements that prevent a station from granting retransmission consent was created by the Commission and is not mandated by Congress, there is no reason why the Commission cannot revise it.[61] At very least, the Commission should make clear that it is a violation of the good faith requirement for a station to enter into an affiliation agreement that prevents the station from granting

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[59] *See NPRM* at n. 96.

[60] *See, e.g.*, 138 Cong. Rec. S562-63 (Jan. 29, 1992) (remarks of Sen. Inouye) ("The retransmission provisions of 8.12 will permit local stations, not national networks, as I have indicated, to control the use of their signals."); 138 Cong. Rec. H6491(July 23, 1992) (Remarks of Rep. Callahan) ("This right of retransmission consent...is a local right. This not, as some allege, a network bailout for Dan Rather or Jay Leno. Networks are not a party to these negotiations, except in those few instances where they own local stations themselves."); 138 Cong. Rec. I-16493 (July 23, 1992) (remarks of Rep. Chandler) ("The intent of the [retransmission consent] amendment was to give bargaining power to local broadcasters when negotiating the terms of cable carriage — not to serve as a subsidy for major networks.").

[61] Labor law provides a useful comparison point here. As noted previously, *supra* n. 51, pressuring a neutral third party to decline to do business with the other party to the negotiation is an unlawful unfair labor practice. Similarly, a broadcaster engaged in retransmission consent negotiations with an MVPD should be prohibited from putting pressure on third party out-of-market stations to decline to enter into a retransmission consent agreement with the MVPD.

retransmission consent for out-of-market carriage by an MVPD after the end of the cooling off period.[62]

Finally, taking another page from how the good faith negotiation requirement has been implemented in the labor law context, the Commission should amend its rules to create a presumption of bad faith if either party refuses to submit to mediation during the cooling off period.[63] Under this fast track mediation process, within the first ten days of the cooling off period, the parties would be required to mutually select a mediator (from a list maintained by the Commission) and provide the mediator with whatever information they deem relevant to support their last offers as well as a brief history of the negotiations. The mediator then would have 20 days to draft a report, which would be provided first to the parties. If the parties still cannot reach an agreement within ten days after receiving the report, the report would be made public and would be provided to the Commission, which would have the final 20 days of the cooling off period to decide whether to take any further action (including extending the cooling off period and ordering the parties back to the negotiating table), using the mediator's report as a foundation for its decision.

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[62] In the alternative, as discussed in the *NPRM*, the Commission should clarify that it is a violation of the good faith rules for a station to enter into a network affiliation agreement that limits the station's right to grant consent to out-of-market carriage of its signal if such agreement does not also contain a provision requiring the network to waive that restriction in order to allow the signal to be imported to consumers who otherwise would be unable to access the network's programming from their preferred MVPD. *NPRM* at n. *95, citing Reciprocal Bargaining Order* at ¶ 35.

[63] The "fast track" mediation process described in the text is loosely modeled on the approach followed in resolving negotiating impasses that would disrupt the transportation industry. *See* Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 (1926).

2. The Commission's Rules Should Make it a Per Se Good Faith Violation for a Broadcaster to Use Internet Blocking as a Tactic in Retransmission Consent Disputes.

Mediacom was particularly gratified to see that the legislative history of Section 103(c) directs the Commission to address reports that broadcasters have begun to interfere with consumers' online access to content that the broadcaster otherwise makes universally available for free, as a tactic to gain leverage in retransmission consent disputes.[64] Mediacom first raised this issue in a Petition for Rulemaking filed over a year ago.[65] As Mediacom pointed out in its comments in support of its petition, a broadcaster that employs this tactic is seeking to punish the MVPD for resisting its demands and thereby coerce the MVPD into giving in. But the MVPD is not the only one harmed – innocent consumers, including broadband consumers who may not even subscribe to the MVPD's video service, also are victimized.[66]

The *NPRM* suggests that there is an actual controversy over whether the Commission should prohibit this practice.[67] But the fact is that Internet blocking is so beyond the pale that the broadcasters' comments in response to Mediacom's petition made no attempt to justify the practice as somehow protecting or furthering the public interest.[68] And while a few broadcasters

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[64] *Senate Commerce Committee Report* at 13.

[65] Mediacom Communications Corporation, *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, at 13 (filed July 21, 2014) ("*Mediacom 2014 Rulemaking Petition*").

[66] Reply Comments of Mediacom Communications Corporation, *Mediacom 2014 Rulemaking Petition*, at 8-9 (filed Aug. 2014) ("*Mediacom RM-11728 Reply Comments*").

[67] *NPRM* at ¶ 13.

[68] *Mediacom RM-11728 Reply Comments* at 19-20.

suggested that there would be some Constitutional issue raised if the practice was prohibited, none of those commenters provided any actual legal support for their argument.[69]

Engaging in Internet blocking tactics to gain leverage in retransmission consent negotiations has drawn widespread condemnation from members of Congress as well as Chairman Wheeler.[70] The Commission should put an end to the practice by declaring it to be a *per se* violation of the good faith negotiation requirement.[71]

3. The Commission's Rules Should Limit the Broadcasters' Communications with an MVPD's Customers.

One of the ways that broadcasters attempt to bully an MVPD into accepting their negotiating demands is by communicating with the MVPD's customers about an impending blackout threat even before the negotiations reach an impasse. According to the broadcasters, their motivation in reaching out to an MVPD's customers (through crawls, radio and newspaper ads, website messages and even blast emails) is to alert them to the fact that a deadline is approaching after which they may not be able to receive a particular station's programming from their preferred MVPD and to inform them of options for maintaining access to the programming.

In truth, broadcasters are more interested in disrupting the relationship between MVPDs and their customers and in causing those customers to make hasty, ill-advised decisions than they

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[69] *Id.*

[70] *Id. See also* John Eggerton, *INTX 2015: Kent Quizzes Commissioners On Dispute-Related Blocking*, MULTICHANNEL NEWS, May 7, 2015 (quoting FCC Commissioner Rosenworcel calling it "flat out a problem" when a consumer cannot access content online due to a retransmission consent dispute).

[71] In fact, a similar tactic – the secondary boycott – is unlawful under the NLRA. A secondary boycott is when one party to a negotiation (such as a union) uses economic pressure against a neutral third party in order to influence the other party to the negotiations (such as the employer). *See supra* n. 51. The ban on secondary boycotts protects neutral third parties and furthers the purpose of the NLRA by eliminating a roadblock to interstate commerce. *Id.* Internet-service customers are neutral third parties that are pressured by one side of retransmission consent negotiations – the broadcasters – for the purpose of applying pressure on MVPDs. This is contrary to the public interest, the purpose of the retransmission consent regime, and the goals of the Communications Act.

are in informing consumers of all of their options. For example, in one instance, a broadcast group with whom Mediacom was negotiating for a retransmission consent agreement renewal began running crawls about the dispute not only on the stations covered by the expiring agreement, but also on a co-owned station that was the subject of a separate retransmission consent agreement that was not scheduled to expire for more than five months. The clear motivation for running the crawls so far in advance was to put additional pressure on Mediacom by creating an atmosphere of fear and confusion that would induce some subscribers to unnecessarily seek alternative sources for a station that was in no immediate danger of being blacked out.

The timing of the broadcasters' notices about allegedly impending blackouts is one part of the problem. The content of those notices is another. Rather than being an honest effort to convey accurate and useful information to consumers, the broadcasters' messages tend to be alarmist in tone and blame the MVPD for the impending service disruption. These messages often become more frequent and foreboding as the expiration date approaches, causing more consumer anxiety – all in hopes of increasing the number of subscribers that switch to a competing MVPD.

What broadcasters do not say in their notices and crawls about an allegedly imminent blackout can be as telling as what they do say. The notices published by stations about a potential blackout situation never inform consumers that the broadcaster is the one that set the deadline and that the broadcaster has the power to extend that deadline while negotiations continue if it so wished. And while the broadcasters' public position is that consumers always have off-air reception as a fallback if a blackout occurs, the messages that they send to consumers rarely mention that option. Instead, they only identify certain other MVPDs that

currently carry the broadcaster's signal (but who might themselves be the subject of a future blackout threat). The reason for this is that when consumers switch to a different MVPD instead of relying on over-the-air reception, the broadcaster collects retransmission consent fees.[72]

Finally, the harm created by the broadcasters' practice of publishing notices and crawls in advance of a blackout deadline is not limited to the MVPD it is targeting. The broadcasters' notices and crawls are not and cannot be directed solely to the customers of the MVPD with whom the broadcaster is negotiating. As a result, all of the local station's viewers, including the subscribers of other MVPDs, receive the notice. This further exacerbates the unnecessary confusion that the notices cause among the members of the public.

Mediacom previously suggested that one way to minimize this confusion (and prevent broadcasters from gaining unreasonable leverage by interfering with an MVPD's relationship with its customers) is to restrain broadcasters from abusing their public trust during retransmission consent negotiations.[73] As a starting point, the Commission should rely on the existing rules that dictate the circumstances under which MVPDs are required to give subscribers notice of service changes and the method and timing of such notifications.[74] These required notifications should be the only permissible communications regarding retransmission consent related service interruptions.

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[72] Of course, for a great many customers, over-the-air reception is not possible, notwithstanding the broadcast industry's claims that their signals are always available. *See* Letter from Joseph E. Young, Senior Vice President and General Counsel, Mediacom, to Michele Ellison, Chief of Staff, Commissioner Clyburn, MB Docket No. 10-71 (September 16, 2013).

[73] *See, e.g., Joint Reply Comments*, at 25-28; Letter from Seth A. Davidson, Counsel to Mediacom, to Chairman Julius Genachowski, et al., MB Docket No. 10-71 (Aug. 12, 2010).

[74] 47 C.F.R. § 76.1603.

If the Commission nonetheless believes that the existing rules are deficient in some way, then the solution is to amend them to correct the perceived deficiency. For example, the Commission could clarify the frequency and timing of such notices and prescribe a standard text.[75] As clarified, the obligation to give notice regarding a blackout would not be triggered by the mere potential for a service interruption; the loss of service would have to be all but certain due to one party or the other having declared that an impasse exists.[76] The text of the notices would be limited to factual information about the current status of the negotiations and would direct consumers to the MVPD's website for additional information.[77]

As the Commission concluded when it adopted specific rules governing the information that broadcasters, MVPDs, manufacturers and retailers were required to provide consumers in advance of the broadcast digital transition, "the government has broad powers to require the disclosure of 'factual and uncontroversial information' where commercial speech is concerned, especially to 'dissipate the possibility of consumer confusion or deception,' as long as such requirements are reasonably related to the government's regulatory goals."[78] Addressing the broadcasters abusive notice tactics by ensuring that consumers receive dispassionate, accurate information about retransmission consent disputes can only help to cool the tensions that often fuel blackouts.

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[75] The current rule requires that notices of service changes that are in the control of the cable operator must be given 30 days in advance. 47 C.F.R. § 76.1603.

[76] Assuming the adoption of the cooling off proposal described above, notification of the deletion of the blacked out channel and the addition, if any, of a substitute channel, would not have to be made until 30 days before the end of the cooling off period.

[77] *DTV Consumer Education Initiative*, Report and Order, 23 FCC Rcd 4134, ¶ 65 (2008) *citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651-52 (1985).

[78] *Id.*

4. The Commission's Rules Should Make It a Presumptive Violation of the Good Faith Requirement for a Bargaining Party to Insist that an Agreement Expire on a Different Date than the End of the Three-Year Retransmission Consent Election Cycle.

Congress mandated that retransmission consent elections and the subsequent negotiations would occur on a three-year cycle.[79] However, over time, this cycle has been corrupted by the proliferation of retransmission consent agreements with varying terms. As a result, the uniformity and certainty that Congress sought when it mandated that retransmission consent elections and negotiations take place on a standardized three-year cycle no longer exists.

This is significant because the three-year cycle was intended as more than a mere convenience. With varying cycles, broadcasters are able to manipulate the expiration dates of their retransmission consent agreements and thereby maximize their negotiating leverage. In contrast, if all of the stations and MVPDs in a market are on the same cycle, broadcasters have as much to lose as the MVPDs. This point was not lost on Senator Bradley, who cited the fact that "[w]hatever terms are negotiated will only last for 3 years" as one of the reasons that retransmission consent was not expected to cause significant increases in the cost of cable service.[80]

In order to effectuate a uniform three-year negotiating and agreement cycle, the Commission will have to address the transition of existing agreements to this new schedule. The Commission also should deem it to be a presumptive violation of the good faith negotiation requirement for a station to grant an extension of a retransmission consent agreement beyond its

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[79] 47 U.S.C. § 325(b)(3)(B).

[80] 138 Cong. Rec. S14603 (Sep. 22, 1992) (Statement of Sen. Bradley).

scheduled expiration date without offering the same extension to all of the other MVPDs in the market.

B. Actions that Will Promote the Preservation and Expansion of Free, Over-the-Air Television.

The decision to give broadcasters the option of seeking compensation from MVPDs that want to retransmit the broadcasters' signals reflected Congress' concern that the ability of cable networks to attract advertising dollars that would otherwise be available to local broadcast television stations threatened the "universal availability" of free, local television programming. However, Congress also was sensitive to the risk that retransmission consent could fuel increases in the price MVPD customers paid for basic service. Consequently, Congress concluded that it was important to strike a balance between the broadcaster's right to seek consideration in exchange for the retransmission of its signal and the impact demands for consideration could have on the rates charged for MVPD service. This balance is expressly manifested in Section 325(b)(3)(A), wherein Congress gave the Commission "a clear mandate to ensure that retransmission [consent] does not result in harmful rate increases."[81]

Unfortunately, when it came time to implement Section 325(b)(3)(A), the Commission decided that there was no need for it to adopt any specific rules addressing the impact of

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[81] 138 Cong. Rec. S562-63 (Jan. 29, 1992) (Statement of Sen. Inouye). *See also id*. ("the FCC must ensure that local stations' retransmission [consent] rights will be implemented with due concern for any impact on subscribers' rates). Other members made similar observations. *See, e.g.*, 138 Cong. Rec. S14248 (Sep. 21, 1992) (Statement of Sen.. Gorton) ("the conference report specifically gives the Federal Communications Commission the authority to ensure that retransmission consent does not adversely impact subscribers' rates"); 138 Cong. Rec. 14603 (Sep. 22, 1992) (Statement of Sen. Wellstone) (the retransmission consent provision, as adopted, "will require the [FCC] to adopt regulations to minimize any rate increase caused by the retransmission consent provisions of the legislation"); 138 Cong. Rec. S14615-16 (Sep. 22, 1992) (Statement of Sen. Lautenberg) (stating that "the bill explicitly provides the FCC authority to prevent broadcaster retransmission consent fees from causing cable rates to rise unreasonably" and adding that "[t]his is a critical safeguard, both for cable operators and consumers").

retransmission consent on subscriber rates.[82] At the time, this did not seem to be a completely irrational decision; after all, during the first few retransmission consent cycles, broadcasters and MVPDs typically reached carriage agreements on the basis of in-kind consideration rather than monetary payments. But those days are long gone and the broadcasters' escalating demands for payment in exchange for retransmission consent are driving up the cost of MVPD service at a pace that far exceeds inflation and that threatens the very consumer harm Congress wanted the Commission to prevent.

The harm caused by runaway increases in retransmission consent fees is compounded by the fact that the broadcasters' demands for these increases are not being driven by the cost of investments that broadcasters are making in locally-oriented and originated programming or in the expansion of the reach of their signals to unserved portions of their markets. The amount of such investments, if and when they occur, is negligible when compared to the amounts that broadcasters are spending to subsidize national broadcast networks or to finance the acquisition or creation of national, rather than local, programming outlets, or to fund stock buybacks or dividend payouts, station acquisitions, or to support unrelated lines of business. The absence of any limits on how broadcasters can spend retransmission consent revenues is one of the principal reasons (if not the principal reason) for the skyrocketing retransmission consent fee increases that consumers are being forced to bear and the service disruptions that occur when MVPDs resist such increases.

While the uses to which local broadcasters put most of the retransmission consent fees they collect may not be illegal, they are inconsistent with public policy. For example, it is clear

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[82] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 178 (1993).

that Congress never intended for the national networks to siphon off a portion of their affiliates' retransmission consent revenues or to dictate the terms on which a station can grant retransmission consent.[83] Even the National Association of Broadcasters, in documents distributed to members of Congress in support of the retransmission consent provision, expressly stated that the national broadcast networks "will not play a role in negotiations between local stations and local cable systems" and would have "no right to demand any part of the benefits which the local station might obtain from a cable system."[84]

It is clear that the increases in retransmission consent fees are not benefitting over-the-air viewers and are triggering blackout showdowns that harm MVPD subscribers. The Commission can and should adopt rules such as those proposed below that will increase the likelihood that retransmission consent revenues will be used for the limited purposes intended by Congress and, thereby, not place as much pressure on MVPD rates.

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[83] During the debate over the retransmission consent provision in 1992, Representative Callahan stated that retransmission consent "is not, as some allege, a network bailout for Dan Rather or Jay Leno." 138 Cong Rec. H6491 (July 23, 1992). *See also* 138 Cong. Rec. H6493 (statement of Rep. Chandler) ("The intent of the [retransmission consent] amendment was to give bargaining power to local broadcasters when negotiating the terms of cable carriage – not to serve as a subsidy for major networks.")

[84] While there were suggestions during the debate over retransmission that broadcasters might accept carriage of newly created channels of programming in lieu of cash payments, there is no indication that members of Congress had anything in mind other than channels containing local content. 138 Cong. Rec. H.8677 (Sep. 17, 1992) (statement of Rep. Fields) ("many broadcasters will negotiate for an additional channel to program. A 24-hour news, sports, or weather service'). *See also* Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92, 102d Cong, 1st Sess. (1991) at 35-36, (suggesting that non-monetary compensation could include joint marketing efforts between local stations and MVPDs, the opportunity to provide [local] news inserts, or the right to program an additional channel).

1. The Commission's Rules Should Distinguish Between Demands for Retransmission Consent Fees that Will Be Used to Support the Preservation and Expansion of Free Over-the-Air Local Television Service and Demands for Fees that Will Be Used for Other Purposes.

Labor law draws distinctions between mandatory, non-mandatory (or "permissive"), and illegal subjects of bargaining.[85] The significance of these distinctions is that agreements relating to illegal subjects are unenforceable, while agreements relating to non-mandatory subjects can be enforced, but insisting on a non-mandatory term to the point of impasse is a violation of the duty to bargain in good faith.[86] Consistent with its authority to ensure that retransmission consent fees are not contributing to unreasonable increases in the cost of MVPD service, the Commission should revise its rules to distinguish between fee increases that will be used to support a broadcaster's acquisition or creation of locally-originated and locally-oriented programming or the investment in facilities that improve the quality or reach of the station's over-the-air signal and fee increases that are budgeted to be used for other purposes. A station's demand for a retransmission consent fee increase that exceeds the verified increase in the station's annual expenditures on local programming or facilities should be deemed an unlawful or, at very least, a non-mandatory subject over which the station may not negotiate to impasse.

2. The Commission Should Require the Parties to Substantiate Claims Made in the Course of a Retransmission Consent Negotiation.

The *NPRM* solicits comments on a proposal submitted by Mediacom and others in anticipation of the commencement of the instant rulemaking proceeding that would import into

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[85] *See, e.g.*, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (explaining that "it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without").

[86] *Id. See also Bartlett-Collins Co.*, 237 NLRB 770, 772-73 (1978) (holding with regard to certain demands that are not about "wages, hours, and other terms of employment," that "these subjects are properly grouped with those topics defined by the Supreme Court as "other matters" about which the parties may lawfully bargain, if they so desire, but over which neither party is lawfully entitled to insist to impasse.").

the Commission's rules the requirement, found in labor law, that the parties substantiate claims made in the course of negotiations.[87] This obligation arises out of the understanding that good faith bargaining "necessarily requires that claims made by either bargainer should be honest claims" and that the accuracy of a negotiating party's assertions can only be ascertained by the disclosure of supporting information.[88] Moreover, requiring the exchange of relevant information during negotiations will help mitigate differences in the parties' bargaining power and increase the chances that the negotiation will result in an agreement.[89]

The Commission recognized in its *Good Faith Order* that a "[b]lanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation" because it results in the other party having to negotiate "in a vacuum."[90] However, the Commission stopped short of adopting the labor law duty to disclose, stating that "[b]roadcasters are not required to justify their explanations by document or evidence."[91]

The reason given by the Commission for not imposing a duty to disclose was that there was no "mutuality of obligations" under the initial good faith requirement established by Congress in 1999.[92] But that rationale no longer holds water. Congress amended the good faith requirement in 2004 to impose a "reciprocal" obligation on MVPDs.[93] And where there is a

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[87] *NPRM* at ¶ 8.

[88] *NLRB v. Truitt Manufacturing Co.*, 351 U. S. 149, 152 (1956); *see also KLB Industries, Inc. v. NLRB*, 700 F. 3d 551, 555 (D.C. Cir. 2012), *quoting Truitt*, 351 U.S. at 152-53.

[89] *Truitt*, 351 U.S. at 152-53.

[90] *Good Faith Order* at ¶ 44.

[91] *Id*.

[92] *Id*. at n. 100.

[93] The Satellite Home Viewer and Extension Act of 2004, Pub. L. No 108-447, Sec. 207, 118 Stat. 2809, 3393 (2004 (codified at 47 U.S.C. § 325(b)(3(C)(iii).

mutuality of obligations, the atmosphere of "honesty, purpose and clarity of process" that the good faith requirement is supposed to engender cannot exist if the parties are free to hide the facts supporting their positions.

The duty to disclose can be an important tool in dampening the acrimony and lack of trust that has come to characterize retransmission consent negotiations. Thus, if a broadcaster seeks justify its price demands by a reference to "market prices" or the prices paid by other MVPDs, that broadcaster should be required to substantiate those assertions. And, of course, the adoption of a duty to disclose also is critical to the effectuate the proposed rule, described above, that would require broadcasters to establish what portion of the retransmission consent fees they are demanding will be used to support the preservation and expansion of free, over-the-air television service.

C. Actions that Will Minimize the Forced Bundling of Multiple Video Services.

Mediacom has led the way in urging the Commission to address the forced bundling of programming – a practice that can drive up the cost of cable service by compelling MVPDs to carry, and consumers to pay for, unwanted video services.[94] Tying together a popular local broadcast channel with a less valuable video service can harm consumers and does not advance the localism goals of retransmission consent. As such, it is the antithesis of a good faith bargaining tactic.

Originally, forced bundling most often took the form of demands that, as a condition of receiving the broadcaster's consent to carry a Big Four network affiliate, an MVPD agree to carry and pay for local stations with limited audience appeal – the type of stations Congress

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[94] *See, e.g.*, *Mediacom 2014 Rulemaking Petition* at 14-17; Comments of Mediacom Communications Corporation, MB Docket No. 12-68, at 4-9 (filed June 22, 2012); *Joint Reply Comments* at 50-51.

expected would opt for mandatory carriage rights – or possibly a new and untested national cable network. With the digital transition and the advent of multicasting, broadcasters have had an even larger number of stations – including multiple Big Four affiliates that a single entity would not be permitted to own if they were separately licensed primary stations – available to be combined in a bundled retransmission consent demand.[95]

Notwithstanding Mediacom's general antipathy towards the broadcasters' bundling practices, there may be instances in which a bundled arrangement is capable of producing efficiencies that benefit consumers. For that reason, limiting the negotiating parties' flexibility through an outright ban on bundling might be counterproductive. Instead, Mediacom urges the Commission to consider once again concepts developed and applied in the context of the labor law good faith bargaining requirement. As previously discussed, labor law distinguishes between mandatory and non-mandatory subjects of bargaining, barring the parties from insisting that a non-mandatory term be combined with mandatory terms to the point where negotiations as a whole reach an impasse. Applying this concept to bundled retransmission consent proposals, the Commission should classify bargaining proposals that condition the grant of retransmission consent for a Big Four network affiliate on the carriage of any other video service to be non-mandatory bargaining terms that the other party can refuse without jeopardizing the negotiations over carriage of the Big Four affiliate.

D. Remedies for Violations of the Good Faith Rules.

The *NPRM* solicits comment on a wide variety of proposals for amending the Commission's rules implementing the good faith negotiation requirement. But it inexplicably

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[95] The adoption last year of a ban on joint negotiations by non-commonly owned stations has had little or no impact on broadcasters' bundling practices. This is because multicast stations almost always fall within the commonly-owned station exception.

ignores one very significant issue: the remedies that the Commission can order when the rules are violated. When the Commission first implemented the good faith standard, it concluded that its only options in the event a bargaining party is found to have violated its duty to negotiate in good faith are (i) to order the guilty party to stop violating the rules and renegotiate the agreement consistent with the Commission's decision and (ii) to impose a forfeiture on the guilty party (subject to the statutory limitations).[96]

In other words, the Commission has taken off the table the option of ordering interim carriage, even after a party is found to have violated its duty to negotiate in good faith. An order directing the guilty party to return to the negotiating table that is not backed up by an order requiring the restoration of carriage while the parties continue to negotiate offers little or no relief to the victimized party. And the threat of a forfeiture is unlikely to deter unlawful conduct where the cost of any eventual fine could easily be recovered in future retransmission consent fee increases.

To be sure, the adoption of the proposals described above – particularly the cooling off period proposal and the limits on amount that retransmission consent fees can increase annually – will largely obviate the need for interim carriage or the risk that forfeitures will be recovered in subsequent fee demands. Nevertheless, the Commission should reverse its previous decisions and exercise its power to order continued carriage as a remedy where a bargaining party has negotiated in bad faith. This option is needed to address situations where the violation has led to an impasse and a blackout and can only be fully remedied by restoring carriage while the parties renegotiate. The Commission also should adopt a "standstill" provision, modeled on the

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[96] *Good Faith Order* at ¶¶ 80-82.

provisions adopted in the program access context, whereby interim carriage can be ordered upon a *prima facie* showing of a violation of the good faith requirement.[97]

There is nothing in Section 325 that prevents the Commission from ordering interim carriage and it is clear that Congress expected the Commission to have and exercise that option.[98] Indeed, during the debate over the retransmission consent provision, Senator Inouye, the provision's author (and the bill's floor manager), gave assurances that "the FCC has the authority under the Communications Act and under the provisions of this bill to address" impasses in retransmission consent negotiations and that "the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers."[99] Finally, to the extent possible without additional legislation, the Commission should adopt forfeiture guidelines that allow it to impose penalties that will inflict actual pain on a party that violates the good faith standard.[100] Only through such steps can the Commission ensure that the remedies for violations of its rules will have the desired deterrent effect.[101]

CONCLUSION

For too long the Commission has shirked its responsibility to ensure that consumers are not adversely impacted by the broadcasters' exercise of their right to negotiate retransmission consent agreements with MVPDs. But now Congress has spoken and it is incumbent on the

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[97] 47 C.F.R. § 76.1003(l).

[98] *See* 47 U.S.C. §325; *Joint Reply Comments* at 33-34, 42-46; *2011 Reply Comments*, *supra* n. 20. *See also supra* Part I.C.

[99] 138 Cong. Rec. S643 (Jan 30, 1992). Senator Inouye made the above statement as part of a colloquy with Senator Burdick.

[100] The Commission also should make clear that recovering the cost of a Commission forfeiture is not a valid basis for a retransmission consent fee increase.

[101] Another remedy that the Commission can and should consider would be to bar a broadcaster that violates its duty to negotiate in good faith from electing retransmission consent for the next cycle.

Commission to carry its obligation under Section 103(c) of STELARA by making meaningful changes in its rules that will increase the likelihood that retransmission consent negotiations will produce agreements that are consistent with the public interest.

Respectfully Submitted,

/s/

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